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No. 85-2067

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether defendants prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of their deportation proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (Pet. App. 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (Pet. App. 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to June 16, 1986. The petition for a writ of certiorari was filed on that date and was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1105a provides:

> (a) The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 [review of orders of federal agencies] shall apply to, and shall be the sole

and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial. * * *

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1326 provides:

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United

> States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

STATEMENT

1. In October 1984, the two respondents and 11 other aliens were found deportable at a joint deportation hearing before an immigration judge. Respondents waived their right to appeal the deportation order. Pet. App. 22a-23a.[1] They were escorted across the border at El Paso and given a form that stated, in Spanish and English, that they would be subject to felony charges if they returned. Two months later, respondents were discovered in Lincoln, Nebraska. They were arrested and indicted for violating 8 U.S.C. 1326, which provides that "[a]ny alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in the United States" without the Attorney General's permission is subject to imprisonment for not more than two years. Pet. App. 9a-10a.

The district court dismissed the indictments (Pet. App. 26a). The court first ruled that a defendant in a prosecution under Section 1326 may collaterally attack the validity

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[1] Respondents could have appealed the immigration judge's order to the Board of Immigration Appeals (8 C.F.R. 242.21) and then to a federal court of appeals (8 U.S.C. 1105a(a)).

of the underlying deportation order (Pet. App. 18a). It next determined that respondents were denied due process at their deportation hearing because they had not been made aware that they could apply for suspension of deportation. The court acknowledged that the immigration judge had "technically" complied with the Immigration and Naturalization Service regulation requiring that the defendants be advised that they were eligible for suspension of deportation (*id.* at 22a-23a).[2] The court stated, however, that its review of the hearing showed that "neither of the defendants in this case was in a position to evalute [his rights] intelligently" (*id.* at 23a). The court went on to conclude that respondents were prejudiced because they might have obtained suspension of deportation if they had been able to make an intelligent evaluation of the alternatives open to them (*id.* at 24a).

2. The court of appeals affirmed (Pet. App. 1a-7a). It noted (*id.* at 2a) that in *United States* v. *Spector*, 343 U.S. 169, 172-173 (1952), this Court reserved the question whether a defendant can collaterally attack an order of deportation. The court of appeals recognized that the circuits are divided on the issue,[3] and it sided with those circuits that have permitted collateral attacks on deportation

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[2] The applicable regulation, 8 C.F.R. 242.17(a), provides that "[t]he special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph [which include suspension of deportation] and shall afford him an opportunity to make application therefor during the hearing."

[3] The court listed (Pet. App. 3a) *United States* v. *Petrella*, 707 F.2d 64 (2d Cir.), cert. denied, 464 U.S. 921 (1983); *United States* v. *Gonzalez-Parra*, 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); and *Arriaga-Ramirez* v. *United States*, 325 F.2d 857 (10th Cir. 1963), as not permitting collateral attack; it listed *United States* v. *Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981); *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); and *United States* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964), as permitting collateral attack.

orders. The court held that "a material element of the offense prohibited by 8 U.S.C. 1326 is a 'lawful' deportation and that, therefore, when prosecuting a Section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law" (Pet. App. 3a).[4]

The court rejected the government's contention that this issue is analogous to the issue presented in *Lewis* v. *United States*, 445 U.S. 55 (1980), where this Court held that a defendant in a prosecution for possession of a firearm by a felon could not collaterally attack the validity of his felony conviction. The court of appeals stated that "[i]n *Lewis* the prior decision was judicial, not administrative" and that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here" (Pet. App. 2a-3a & n.1).[5]

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[4] This broad language suggests that in the court's view the question whether defendants were deported lawfully must be submitted to the jury. Other language in the opinion suggests that pretrial review of the deportation order by the court is adequate. Pet. App. 4a. Most of the courts that have permitted collateral attacks in Section 1326 prosecutions have held that pretrial review of the validity of the deportation proceeding by the trial court is adequate. *Rosal-Aguilar*, 652 F.2d at 722-723; *Bowles*, 331 F.2d at 750; compare *United States* v. *Bejar-Matrecious*, 618 F.2d 81, 82-83 (9th Cir. 1980), with *United States* v. *Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980); see also Note, *Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reentry Under Section 276 of the Immigration and Nationality Act of 1952*, 56 Notre Dame Law. 677, 682, 687 (1981). Pretrial review of the validity of deportation orders, but not submission of the issue to the jury, is authorized by 8 U.S.C. 1105a(a)(6) in prosecutions for failure to leave after being ordered deported.

[5] The court of appeals briefly addressed the questions whether the district court was correct in holding that the deportation hearing was

Judge Fagg, dissenting, pointed out that "Section 1326 clearly speaks only of the fact and not the quality of a previous deportation" (Pet. App. 5a). He noted (*ibid.*) that this Court in *Lewis* held that Congress did not intend for courts to inquire into the lawfulness of felony convictions under the statute prohibiting possession of a firearm by a convicted felon. By analogy, he concluded, in prosecutions under Section 1326 a court should not inquire into the lawfulness of prior deportations. Furthermore, Judge Fagg stated (Pet. App. 6a) that his analysis of "the comprehensive scheme for judicial review that is available to aliens" under 8 U.S.C. 1105a showed that Congress intended that aliens would not be permitted to challenge deportation orders during prosecutions for unlawful reentry (Pet. App 6a-7a). Finally, he concluded that the Constitution does not require that aliens be permitted to attack the validity of their prior deportation proceedings in prosecutions under Section 1326 (Pet. App. 7a).

SUMMARY OF ARGUMENT

Section 276 of the Immigration and Nationality Act, 8 U.S.C. 1326, provides that it is a criminal offense for a previously deported alien to reenter the United States

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invalid and whether respondents were prejudiced as a result. The court concluded that the district court had not clearly erred in its rulings on those two points (Pet. App. 4a). We did not challenge that conclusion in our petition for a writ of certiorari. We note nevertheless that the district court found only a "technical" violation of the required procedures (*id.* at 22a-23a). Furthermore, contrary to the district court's conclusion, it is highly unlikely that respondents were prejudiced as a result of the immigration judge's failure to explore the possibility that they might qualify for suspension of deportation. Suspension of deportation is an extraordinary remedy that is seldom granted, and its requirements have been strictly construed. See *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Phinpathya*, 464 U.S. 183 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981).

without the Attorney General's permission. The plain language of the statute gives no support to the court of appeals' conclusion that the "lawfulness" of the prior deportation order is an element of a Section 1326 violation. Nor is there anything in the legislative history of Section 1326 to indicate that Congress intended to permit collateral attacks on the validity of deportation orders in Section 1326 prosecutions. To the contrary, the legislative background strongly suggests that Congress did not mean to require the government to prove that a defendant was deported lawfully. The predecessor to Section 1326 provided that it was a crime to reenter the United States after having been deported "in pursuance of law," and Congress omitted that phrase or any equivalent when it enacted the current version of Section 1326.

Congress's intent not to permit collateral attacks on deportation orders in Section 1326 proceedings is further reflected by other provisions of the Immigration and Nationality Act. Section 1105a of the Act provides what it terms the "sole and exclusive" procedure for obtaining judicial review of deportation orders. That section thus creates a mechanism by which persons who are ordered deported can obtain review of their deportation orders. At the same time, the provision for exclusivity in that section rebuts the claim that the validity of deportation orders can be independently reviewed in the course of criminal proceedings under Section 1326. Congress's intent to bar collateral attacks on deportation orders is also strongly supported by a specific provision permitting such challenges in other criminal proceedings under the Act. In 8 U.S.C. 1105a(a)(6), Congress explicitly permitted defendants to challenge the validity of their deportation orders in prosecutions for failing to depart from the United States after being ordered deported (8 U.S.C. 1252(e)), and in prosecutions for violating the supervisory regulations after being ordered deported (8 U.S.C. 1252(d)). By contrast,

there is no such express authorization for collateral attacks on deportation orders in proceedings under Section 1326. In fact, another provision of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), flatly bars challenges to the validity of a deportation order after the alien has been deported. In light of the legislative background and context of Section 1326, the conclusion that Congress did not intend to permit collateral attacks on deportation orders in prosecutions brought under Section 1326 is inescapable.

There is nothing unconstitutional about Congress's decision to prohibit the act of reentry into the United States by a deported alien without permitting review of the underlying deportation order as part of the criminal prosecution. A different question would be presented if no provision whatever were made for judicial review of the deportation order. Section 1105a of the Act, however, provides a mechanism for review of deportation orders. It is not fundamentally unfair to prosecute aliens who do not appeal their deportation orders but then return to the United States without the Attorney General's permission; in that setting, no principle of due process requires that the aliens be permitted to challenge the validity of the prior deportation orders that they declined to challenge at the time the orders were entered.

ARGUMENT

DEFENDANTS PROSECUTED UNDER SECTION 1326 FOR REENTERING THE UNITED STATES AFTER HAVING BEEN DEPORTED MAY NOT COLLATERALLY ATTACK THE VALIDITY OF THEIR DEPORTATION PROCEEDINGS

A. The Language And Legislative History Of Section 1326 Demonstrate That A "Lawful" Deportation Is Not An Element Of The Offense Prohibited By That Section

In 1984, when respondents were ordered deported, they waived their right to appeal their deportation orders. At the time of their deportation, respondents were informed that

they would be subject to felony charges if they returned to the United States without permission. They nevertheless returned without authorization, and they now argue that in order to convict them of making an unauthorized reentry into the country after having been deported, the government must prove that their deportation proceeding was conducted lawfully.

1. Nothing in the Immigration and Nationality Act, 8 U.S.C. (& Supp. II) 1101 *et seq.*, supports respondents' argument.[6] Rather, the Act makes clear that Congress intended to prohibit deported aliens from returning to this country without the Attorney General's permission. There is no suggestion that Congress meant to permit returning aliens to attack orders under which they had previously been deported.

This Court has stated repeatedly that "in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980), quoting *Reiter* v. *Sonotone Corp.*,, 442 U.S. 330, 337 (1979); see also *United States* v. *James,* No. 85-434 (July 2, 1986), slip. op. 6; *Randall* v. *Loftsgaarden*, No. 85-519 (July 2, 1986), slip op. 8; *United States Department of Transportation* v. *Paralyzed Veterans*, No. 85-289 (June 27, 1986), slip op. 6; *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12; *United States* v. *Rojas-Contreras*, No. 84-1023 (Dec. 16, 1985), slip op. 3. Section 1326 unambiguously provides that "[a]ny alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in the United States" without the Attorney General's permission is subject to imprisonment for not more than two years. The statute does not require that the

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[6] Although the Immigration and Nationality Act has recently been substantially revised, none of the 1986 amendments to the Act affect the issues in this case.

alien must have been "lawfully" deported, nor does it contain any other language supporting the conclusion that a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order. Rather, the language of the statute plainly and simply provides that it is a crime to reenter the United States without the Attorney General's permission after having been deported.[7] Under the plain language of the statute, it is the *fact* of deportation, not its lawfulness, that provides the basis for criminal liability.

It is beyond dispute that Congress could rationally choose to make unauthorized reentry criminal, without regard to the lawfulness of the deportation. Permitting collateral attacks on the validity of deportation orders poses serious practical problems in cases where the underlying deportation proceeding occurred many years before the prosecution for reentry. To permit such collateral attacks would reward the self-help remedy of reentry without permission. By contrast, prohibiting reentry without regard to the validity of the deporation order provides an incentive to the alien to challenge the validity of deportation orders promptly or to seek permission from the Attorney General before reentering.

By prohibiting reentry on the part of a previously deported alien, Section 1326 is analogous to 18 U.S.C. App. 1202(a)(1), which prohibits previously convicted felons from possessing firearms, and 18 U.S.C. 751, which prohibits previously convicted felons from attempting to escape from federal custody. This Court held in *Lewis* v. *United States, supra*, that Congress chose to make possession of a firearm by a felon a criminal offense, regardless

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[7] Aliens who have been deported may request permission to reenter by completing Form I-212, "Application for Permission to Reapply for Admission into the United States after Deportation or Removal." See 8 C.F.R. 212.2.

of the validity of the underlying felony conviction.[8] Similarly, the courts of appeals have uniformly held that defendants in prosecutions for escaping from federal custody may not challenge the validity of the convictions that led to their being in custody. See *United States* v. *Pereira*, 574 F.2d 103, 106 n.6 (2d Cir. 1978); *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States* v. *Smith*, 534 F.2d 74, 75 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977).

Relying on *United States* v. *Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981); *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); and *United States* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964), the court of appeals nevertheless held that "a material element of the offense prohibited by 8 U.S.C. § 1326 is a 'lawful' deportation." Pet. App. 3a. There is simply no basis for that construction of the statute.

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[8] The court of appeals noted (Pet. App. 2a-3a n.1) that the ultimate resolution of the issue in *Lewis* turned on the language of the statute at issue there and Congress's intent in passing it. That is correct. Our point is simply that in some situations Congress reasonably may desire to prohibit specific conduct (possession of a firearm or reentry into the United States) by a class of individuals (felons or deported aliens) without premitting reconsideration of the facts that led to the determination that the individual was a member of the class in question. The court of appeals further noted (*ibid.*) that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here." That comment misses the point. While Congress does not intend to expel aliens who have a right to be in this country, it certainly has an interest in ensuring that aliens who have been determined not to have the right to be in this country follow the procedures it has established in challenging that determination.

The construction of the statute requiring proof that the deportation was lawful originated with the Third Circuit's decision in the *Bowles* case. The court of appeals in that case stated, without citation of authority, that "[w]hen Congress made use of the word 'deported' in the statute, it meant 'deported according to law.' " 331 F.2d at 749 (emphasis in original). The court, however, did not explain why, if Congress meant to say "deported according to law," it did not say so explicitly. Nor has any court since *Bowles* provided any more support for that construction of the statute than the *ipse dixit* assertion in the *Bowles* case itself. The Court in *Gasca-Kraft* merely relied on prior cases, primarily *Bowles*, in holding that "[a] material element of the offense defined by 8 U.S.C. § 1326 is a *lawful* deportation." 522 F.2d at 152 (emphasis in original).[9] The court of appeals decisions on which the court in this case relied thus provide no persuasive justification for departing from the plain language of Section 1326. As this Court has stated repeatedly in response to efforts to read additional elements into criminal statutes, " '[t]he short answer is that Congress did not write the statute that way.' " *Russello* v. *United States*, 464 U.S. 16, 23 (1983), quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979); see *United States* v. *Culbert*, 435 U.S. 371, 373-374 (1978). Rather, "[t]he lack of any express reference to the validity of the deportation or of the arrest indicates that the statute seeks to punish the unauthorized reentry of an alien previously deported, regardless of whether the deportation was 'lawful.' " *United States* v. *Petrella*, 707 F.2d 64, 66 (2d Cir. 1983).

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[9] The court in *Gasca-Kraft* also relied upon *United States* v. *Heikkinen*, 221 F.2d 890, 892 (7th Cir. 1955), where the court, in a prosecution under 8 U.S.C. 1252(e) for failure to depart, stated without citation of authority that the validity of the underlying deportation order "is an inescapable ingredient of the statutory offense with which defendant is charged."

2. Nothing in the legislative history of Section 1326 justifies inserting the word "lawful" into that statute. Section 1326 was adopted in 1952 as part of the Immigration and Nationality Act. Prior to 1952, reentry into the United States by an alien who had been deported was prohibited by 8 U.S.C. (1946 ed.) 180, which was enacted in 1929. Section 180 was adopted because Congress concluded that "[a] serious situation has arisen, particularly on our land borders, whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation." H.R. Rep. 2418, 70th Cong., 2d Sess. 6 (1929). Congress remedied that situation by providing in Section 180 for two years' imprisonment, in addition to exclusion or deportation, for "any alien * * * arrested and deported in pursuance of law, * * * [who] enters or attempts to enter the United States." Since that statute made its penalties applicable in cases where an alien had been deported "in pursuance of law," there would have been a basis for arguing that collateral attacks were authorized under Section 180.[10]

The phrase "in pursuance of law" was deleted when Section 1326 was enacted.[11] While Congress did not explain why it deleted that phrase, the most reasonable explana-

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[10] We have found no case addressing the question whether collateral attacks were permitted in criminal prosecutions under Section 180. However, there were several such cases involving the deportation of an alien under Section 180 on the ground that the alien had previously been deported. And in those cases, despite the inclusion of the phrase "in pursuance of law" in Section 180, the courts held that collateral attacks on the validity of the underlying deportation were not permitted, at least in the absence of "a gross miscarriage of justice in the former proceedings." *United States ex rel. Rubio* v. *Jordan*, 190 F.2d 573, 576 (7th Cir. 1951); see also *United States ex rel. Bartsch* v. *Watkins*, 175 F.2d 245, 247 (2d Cir. 1949).

[11] Section 1326 is similar to Section 180 in most other respects. One difference is that Section 1326 makes it a crime for a deported alien to be "found in the United States." Section 180 prevented only reentry,

tion for the deletion is that Congress wanted to make criminal the act of reentering the United States following a deportation, without regard to the lawfulness of the deportation. In any event, it seems clear that the drafters of Section 1326 made a conscious decision not to require proof that a prior deportation was "lawful," since they had to take the affirmative step of striking the phrase "in pursuance of law" that had appeared in Section 180.[12]

The deletion of the phrase "in pursuance of law" from Section 1326 is analogous to the deletion of limiting language from an early version of a bill. This Court has stated that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. Similarly, where Congress deletes a phrase from prior law in the course of enacting a new law, it ought to be presumed that Congress did not intend to preserve the requirement that would have been imposed by the deleted phrase. Therefore, the fact that "in pursuance of law" was deleted by Congress when it enacted Section 1326 strongly counsels against inserting the word "lawful" into that provision, as the court of appeals did in this case.

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which led to problems in establishing venue in cases in which aliens were found in the United States after their deportation, but in which the government could not determine where they reentered. *Revision of the Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before Subcommittees of the Committees on the Judiciary*, 82d Cong., 1st Sess. 716 (1951) (statement of Deputy Attorney General Ford).

[12] The House Report on the Immigration and Nationality Act, which compared the "proposed law" to the "existing law," printed the text of Section 1326 next to the text of Section 180, so the change was apparent to anyone who read the report. H.R. Rep. 1365, 82d Cong., 2d Sess. 219-220 (1952).

B. Section 1105a Provides The "Sole And Exclusive" Procedure For Obtaining Judicial Review Of Orders Of Deportation, And It Bars Post-Deportation Review Of Deportation Orders

The statutory provision that deals expressly with judicial review of deportation orders, 8 U.S.C. 1105a, makes clear that Congress did not intend to permit collateral attacks on the validity of deportation hearings in Section 1326 prosecutions. Section 1105a(a) provides that the procedure under which orders of federal agencies are reviewed in the federal courts of appeals (see 28 U.S.C. 2341 *et seq.*) is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Thus, under Section 1105a(a) an alien may obtain review of a deportation order by exhausting his administrative remedies and filing a petition for review within six months of the date of the final deportation order (8 U.S.C. 1105a(a)(1)).[13]

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[13] Prior to 1952, it was clear that deportation orders could be challenged only through habeas corpus proceedings. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50 (1955). The Court held in *Pedreiro* that under the 1952 Act aliens ordered deported could also challenge deportation orders under the Administrative Procedure Act. After a number of aliens succeeded in delaying their deportations for many years through such challenges, Congress in 1961 enacted Section 1105a to limit review of deportation proceedings. Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts,* 71 Yale L. J. 760, 760-762 (1962). The House Report on the 1961 amendment stated that "[t]he purpose of [Section 1105a] is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H.R. Rep. 1086, 87th Cong., 1st Sess. 22 (1961). The legislative history is replete with statements showing Congress's disapproval of decisions permitting aliens to delay execution of deportation orders by filing repetitive requests for relief under various statutes. See, *e.g.*, *id.* at 22-23; 107 Cong. Rec. 12175 (1961) (statement of Rep. Walter). In holding that collateral attacks are not permitted in Section 1326 prosecutions, the court of appeals in *United States* v. *Petrella, supra*, cited recent cases in which aliens have suc-

There are two exceptions to the rule that review of deportation orders in the courts of appeals following appeal to the Board of Immigration Appeals is the sole and exclusive method of judicial review. First, Section 1105a(a)(9) provides that an alien "held in custody pursuant to an order of deportation" may obtain judicial review through habeas corpus proceedings. Second, Section 1105a(a)(6) provides that defendants in prosecutions under 8 U.S.C. 1252(d) and 8 U.S.C. 1252(e) may challenge the validity of their deportation orders in the criminal proceedings against them. Section 1252(d) prohibits aliens from violating supervisory regulations after being ordered to be deported, and Section 1252(e) penalizes the failure to depart after being ordered to do so.

Section 1105a(a)(6) makes it perfectly clear that Congress knew how to permit collateral attacks on the validity of deportation orders in criminal prosecutions when it wanted to do so. The fact that Congress did not provide such an exception in the case of prosecutions for reentering the United States in violation of Section 1326, while it did so in the case of prosecutions for failing to depart in violation of Section 1252(e) and prosecutions for failing to observe supervisory regulations in violation of Section 1252(d), makes it all the more clear that it did not intend to permit collateral attacks in unlawful reentry cases.

If Congress had intended to permit collateral attacks in unlawful reentry cases, it presumably would have added a separate exception to Section 1105a providing for review in those cases. By the same token, if Congress had believed that Section 1326 permitted collateral attacks on deportation orders even though it does not expressly provide for such challenges, it is difficult to explain why Congress

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ceeded in delaying deportation for many years and stated that it was "loath to add a further avenue of attack on deportation orders, in view of the formidable administrative and judicial arsenal available to litigants seeking review of such orders." 707 F.2d at 66 n.3.

would have felt the need to make express provision for such challenges in the case of prosecutions brought under Section 1252(d) and (e).[14]

Another provision of Section 1105a makes it even more evident that Congress did not mean to permit an alien to challenge the validity of his deportation order after he had been deported and had made an unauthorized reentry into this country. Section 1105a(c) provides that an "order of deportation or exclusion shall not be reviewed in any court if the alien * * * has departed from the United States after issuance of the order." That provision evinces a clear congressional intention to restrict the time and setting of challenges to the validity of deportation orders. In light of Congress's express and unqualified determination that deportation orders shall not be challenged after the alien

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[14] Congress did not explain why it authorized collateral attacks in cases where aliens had not left the United States (Section 1252(e)), or had violated supervisory regulations (Section 1252(d)), but did not authorize collateral attacks in cases where aliens had been deported (Section 1326). Nonetheless, there are at least two reasons why Congress might have chosen that course. First, Congress might have been concerned about the argument made by the dissenters in *Spector* that some aliens ordered deported might not find a country that would accept them (343 U.S. at 179-180). In such cases an alien prosecuted for failing to leave or for violating supervisory regulations could presumably raise his failure to find a country that would accept him as a reason why the underlying deportation order should be overturned; an alien who was deported and reentered, by contrast, could not argue that no country would accept him. Second, Congress might have thought that most prosecutions for failing to depart and for violating supervisory regulations would be conducted at a time when it would not be difficult to examine the procedures followed at the deportation proceeding in question. Prosecutions for reentry, by contrast, would often occur at a much later date when it would be more difficult to reconstruct the circumstances of the deportation hearing. That congressional purpose is consistent with the restriction on the right to challenge deportation orders that Congress inserted in Section 1105a(c), which bars any review of an order of deportation after the alien has left the United States.

has left the country, it would be quite anomalous to suggest that Congress meant to permit precisely those kinds of challenges in prosecutions under Section 1326, even though it included nothing to that effect in the language of the statute.

None of the courts that have permitted collateral attacks in Section 1326 prosecutions have offered any explanation why Congress would not have provided in Section 1105a for review of deportation proceedings in Section 1326 prosecutions if it intended to authorize such collateral review.[15] Yet, as the court concluded in *Petrella* (707 F.2d

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[15] The district court in this case noted (Pet. App. 14a) that the court in *Mendez* v. *INS*, 563 F.2d 956 (9th Cir. 1977), "rejected the INS contentions that the alien's appeal was barred by 8 U.S.C. § 1105 (a) [*sic*]." In *Mendez* an alien who was deported under 8 U.S.C. 1251(a)(4) because he had been convicted of a crime and sentenced to one year's imprisonment sought reconsideration by the Board of Immigration Appeals because the court that had sentenced him vacated its previous order and imposed a sentence of less than a year, which is not a basis for deportation. 563 F.2d at 957. The court held that Section 1105a(c), which provides that a deportation order may not be reviewed "if [the alien] has departed from the United States after the issuance of the order," did not deprive it of jurisdiction over the alien's claim that the Board should reconsider its deportation order. The decision in *Mendez* is clearly inapposite. The alien in *Mendez* was pursuing his "sole and exclusive" remedy, review of deportation orders by the Board, and the decision in that case is limited to the effect of deportation on an alien's right to continue to pursue that remedy. Nothing in *Mendez* addresses the question whether, in addition to the three procedures set forth in Section 1105a, an alien may challenge his deportation order in a prosecution under Section 1326. Ninth Circuit opinions have nevertheless cited *Mendez* in deciding not to reconsider the holding in *Gasca-Kraft* that defendants in Section 1326 prosecutions may collaterally attack their deportation orders (see, *e.g.*, *United States* v. *Calderon-Medina*, 591 F.2d 529, 530 n.4 (9th Cir. 1979); *United States* v. *Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978)). Like *Gasca-Kraft*, the subsequent decisions have failed to address the fact that Section 1105a provides the "sole and exclusive" procedure for challenging deportation orders and does not provide for challenges in Section 1326 prosecutions.

at 66), Congress's refusal to provide in Section 1105a for review of deportation orders in prosecutions for reentering the United States without the Attorney General's permission clearly shows that Congress intended to bar collateral attacks in those cases.

C. The Constitution Does Not Require Section 1326 To Be Construed To Provide For Collateral Attacks On The Validity Of Deportation Orders

The court of appeals suggested (Pet. App. 4a) that permitting collateral attacks on deportation proceedings in Section 1326 prosecutions "insures fundamental fairness." Contrary to the court's suggestion, there is nothing unfair about punishing the act of unauthorized reentry into the United States following deportation. An alien who has been ordered deported and who wants to challenge his deportation order may do so pursuant to Section 1105a. It is certainly preferable, from the alien's point of view, to be permitted to challenge his deportation order in a civil proceeding than to be forced to risk criminal sanctions in order to challenge the order. Nor is there anything unfair about requiring an alien to challenge his deportation order before leaving the country or not at all. That requirement is analogous to any other requirement that forces a litigant to raise a claim at a specified time or waive it. Furthermore, unlike most criminal defendants, defendants in Section 1326 prosecutions are typically given written notice at the time of their deportation proceedings that they will be subject to felony charges if they return to the United States without the Attorney General's permission. Pet. App. 9a. Finally, even the alien who fails to challenge his deportation at the time it is issued is not forever foreclosed from returning to this country; if he obtains permission to reenter, he can return without being subject to the sanctions of Section 1326. Under those circumstances, it is

hard to understand how it could be fundamentally unfair to prosecute a returning alien who has declined to challenge his deportation at the appropriate time.

Citing *United States* v. *Spector*, 343 U.S. 169 (1952), the Third Circuit in *United States* v. *Bowles* stated that by construing the term "deported" in Section 1326 to mean "deported according to law" it was able to avoid a "serious constitutional issue" (331 F.2d at 749 & n.13). The dissenters in *Spector* contended that the Constitution requires that an alien be shown to be deportable before he can be convicted of unlawfully failing to depart. Some of their concerns, however, were addressed by Congress when it subsequently enacted Section 1105a. First, at the time *Spector* was decided, it was not clear that deportation orders were subject to judicial review at all (see 343 U.S. at 179 (Jackson and Frankfurter, JJ., dissenting)); Section 1105a(a) now makes it clear that deportation orders are reviewable by the courts of appeals. Second, the *Spector* dissenters were concerned that some aliens who were ordered deported might not find a country that would accept them (343 U.S. at 179-180); because Section 1105a(a)(6) authorizes judicial review of the validity of a deportation order in the case of an alien who is prosecuted for failing to leave the country, an alien who cannot find a country that will accept him can obtain judicial review of the validity of the deportation order in his criminal proceeding, even if he has not pursued an appeal under Section 1105a(a).

The dissenters in *Spector* were particularly troubled by the fact that criminal liability was being imposed for remaining in the country after being ordered deported; in effect, the statute imposed criminal liability for failing to comply with an order of deportation. Under Section 1326, by contrast, the offense at issue is quite different in character: the defendant does not violate the statute simply by failing to respond to the deportation order. Instead,

he must take the affirmative step of reentering the country before he is liable to prosecution. In that setting, unlike in *Spector*, denying the defendant the right to challenge his deportation order does not have the effect of subjecting the only meaningful feature of the criminal case to binding administrative resolution. Thus, it is not clear that even the dissenters in *Spector* would have had the same constitutional reservations about barring collateral attacks under the current statutory scheme.

At all events, any constitutional objections to the scheme established in Section 1326 were resolved by this Court's decision in *Lewis* v. *United States,* 445 U.S. 55 (1980). In *Lewis*, which was decided after the Third Circuit's decision in *Bowles*, this Court held that a defendant prosecuted for being a previously convicted felon in possession of a firearm could not collaterally attack the validity of his prior conviction in the criminal case. In response to the defendant's due process claim, the Court held that Congress could constitutionally focus "on the mere fact of conviction, [regardless of the validity of the conviction,] as a way to keep firearms away from potentially dangerous persons" (445 U.S. at 67). The Court noted that a convicted felon could "challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm" (*ibid.*). Similarly, in the case of deported aliens, Congress could reasonably determine to limit the elements of the criminal offense to (1) reentry into the United States, (2) without the Attorney General's permission, (3) after having been deported. Like a convicted felon, an alien who is subject to a deportation order has other avenues for obtaining relief. He may challenge the validity of the deportation order in the ways enumerated in Section 1105a, or he may attempt to obtain the Attorney General's permission before reentering the United States.[16]

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[16] Because other avenues for obtaining relief are available, nothing in *Estep* v. *United States,* 327 U.S. 114 (1946), supports the conclusion

The Constitution therefore does not bar Congress from prohibiting the act of reentry itself.[17]

This case is not distinguishable from *Lewis* on the ground that the primary method for challenging deportation orders—through review by a court of appeals of a

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that review of the validity of the deportation proceeding must be permitted in prosecutions under Section 1326. The Court there noted that Congress had made "no provision in terms for judicial review" of the administrative action underlying the criminal prosecution (327 U.S. at 119) and concluded that Congress did not intend to bar any attack on that administrative action (*id.* at 121). Thus, contrary to respondents' claim (Br. in Opp. 5), the decision in *Estep* does not support the conclusion that collateral attack should be permitted here, since Congress provided for judicial review of deportation orders pursuant to Section 1105a. Moreover, the Court stated in *Estep* that "[w]e may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." 327 U.S. at 125. Accordingly, in the case of deportation orders, review pursuant to Section 1105a would be assumed to be exclusive even if Section 1105a did not state that it is the "sole and exclusive" procedure for obtaining review of deportation orders.

[17] This Court applied similar analysis to an analogous problem in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). There, civil rights protesters sought to raise constitutional challenges to an injunction for the first time in criminal contempt proceedings for violation of the injunction. The Court held that the State could constitutionally bar the defendants from raising those challenges in the criminal contempt proceedings, on the ground that they could have raised the same challenges in the injunction proceeding. The defendants had no constitutional right, the Court ruled, to by-pass challenging the injunction and to raise their constitutional objections to the injunction in defending against the criminal contempt charges. The Court has applied the same principle in federal cases, noting that a contempt proceeding " 'does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' " *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 16 n.21, quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948); see also *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976); *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947).

final order of deportation (8 U.S.C. 1105a(a))—is a civil proceeding. In *Yakus* v. *United States*, 321 U.S. 414, 443-446 (1944), the Court upheld the Emergency Price Control Act against a similar constitutional challenge. That Act provided that a person subject to a maximum price regulation could challenge its validity only through a civil proceeding; a defendant could not challenge the validity of a maximum price regulation in a criminal proceeding for violating the regulation. The Court found no constitutional infirmity in that statutory scheme. In reaching that conclusion, the Court stated (321 U.S. at 444) that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Respondents have failed to appeal their deportation order, so they have waived the right to challenge it after reentering this country.[18]

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[18] Respondents seek to distinguish *Yakus* (Br. in Opp. 5-6) by noting that it involved an exercise of rulemaking rather that adjudicative power. While that is so, it does not change the essential point, which is that Congress can constitutionally permit a jury to rely on the fact that a prior administrative order was violated, rather than requiring review of the administrative proceeding as part of the criminal prosecution. Moreover, there is *less* potential unfairness in basing a criminal prosecution on the violation of an adjudicative order rather than a rulemaking order. An adjudicative order is addressed to the particular individual charged with the violation, whereas a rulemaking order is more general, so that the individual charged with the violation of such an order is less likely to be aware of the terms of the order. In this case, of course, the two respondents were fully aware of the deportation orders against them, and they were apprised both that they could challenge those orders and that they would be subject to prosecution if they returned to the United States without permission and without challenging their deportation orders.

As the court concluded in *Gonzalez-Parra*, there is no constitutional principle requiring that "a deported alien who fails to invoke the procedures of 8 U.S.C. § 1105a be permitted to contest the factual basis for the deportation order after he has reentered the country." 438 F.2d at 699; accord *Petrella*, 707 F.2d at 67. For that reason, there is no need to avoid a difficult constitutional issue by construing Section 1326, contrary to its plain language, to require the government to prove as an element of the crime of unlawful reentry that the defendant was "lawfully" deported.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

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